IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION TO CERTIFY QUESTIONS OF LAW"

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), submits the following response in opposition to "Defendants' Motion to Certify Questions of Law" [DKT #1217] ("Defendants' Certification Motion") and respectfully requests that it be denied in its entirety.

I. Introduction

"Defendants' Motion for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations" [DKT #1064] sought to disqualify the State's outside counsel on the alleged ground that their retention violated the due process provisions of the Oklahoma and United States constitutions, as well as the separation-of-powers provisions of the Oklahoma Constitution. Following extensive briefing and argument on these issues, on June 15, 2007, this Court denied the motion in its entirety. *See* DKT # 1187. From the bench, the Court explained that "I'm satisfied, frankly, that what my experience has been and my understanding of the law is that in Oklahoma these distinctions that [Attorney General Edmondson has] suggested are, in

fact, the law." 6/15/07 Transcript, 128:14-7; *see also* 6/15/07 Transcript, 129:25-130:1 ("I know that the distinctions the attorney general is making here have been made in the past in Oklahoma law").

Defendants have now moved to have the due process and separation-of-power issues under the Oklahoma Constitution certified to the Oklahoma Supreme Court and the due process issue under the United States Constitution certified for interlocutory appeal to the Tenth Circuit Court of Appeals. Defendants' Certification Motion, however, ignores the fact that (1) the Court was (correctly) comfortable in the soundness of the legal underpinnings of its ruling, (2) certification would be contemplated only if the State wanted the issue certified -- which it does not,[1] and (3) certification of the federal due process issue for interlocutory appeal to the Tenth Circuit was never even contemplated. As explained by this Court:

> The only thought in terms of certification is the possibility that this issue isn't going to go away and that perhaps, upon reflection, the attorneys that you've [i.e., Attorney General Edmondson] hired as contingency fee counsel might wish to brief this matter for the Oklahoma Supreme Court. I'm satisfied, frankly, that what my experience has been and my understanding of the law is that in Oklahoma these distinctions that [Attorney General Edmondson has] suggested are, in fact, the law. So I am satisfied so that I'm comfortable in denying the motion because I do predict that if the matter is tested or would be certified -- and I will reiterate that if counsel, first of all, were to agree to certify, I would certainly do that. It would eliminate one possible question mark in this case but I'm satisfied with that.

6/15/07 Transcript, 128:10-22. Simply put, a reading of the transcript indicates that the offer of certification by the Court was made so that the State, if it so desired, could get finality on these issues; the offer was not made so as to afford Defendants a unilateral opportunity to reopen issues they had litigated and lost.

---

[1] This fact was communicated to counsel for the Tyson Defendants by letter dated June 27, 2007. Exhibit 1.

II. Argument

A. Certification of these issues to the Oklahoma Supreme Court is inappropriate

Whether to certify a question of state law to the state supreme court is within the discretion of the federal court. *See Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). "[Certification] is never compelled." *Society of Lloyd's v. Reinhart*, 402 F.3d 982, 1001 (10th Cir. 2005). In fact, "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Armijo*, 843 F.2d at 407. Rather, "[i]t is to be utilized with restraint and distinction." *Ormsbee Development Company v. Grace*, 668 F.2d 1140, 1149 (10th Cir. 1982). Indeed, "[u]nder the diversity statutes the federal courts have the duty to decide questions of state law even if difficult or uncertain." *Society of Lloyd's*, 402 F.3d at 1001 (citations and quotations omitted).

While the State disagrees that the issues presented are in fact unsettled, *see* "State of Oklahoma's Response to 'Motion of Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., and Peterson Farms, Inc. for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations'" [DKT #1085] and 6/17/07 Transcript, pp. 87-132, even assuming *arguendo* that they were, this would be an inappropriate situation for certification for the following reasons:

First, certification should be reserved for those isolated instances where a court has serious doubts about the soundness of the legal underpinnings of its decision. *See, e.g., Armijo*, 843 F.2d at 407; *Ormsbee Development*, 668 F.2d at 1149. Cases cited by Defendants are in accord with this proposition. *See* Defendants' Certification Motion, pp. 5-6 (citing *Garcia v. Federal Insurance Co.*, 473 F.3d 1131, 1136 (11th Cir. 2006) ("when significant doubt exists

about the answer to a material state law question upon which the case turns . . .") (emphasis added) & *Fashion Valley Mall, LLC v. N.L.R.B.*, 451 F.3d 241, 242 (D.C. Cir. 2006) ("Because the underlying question is one of state law as to which we can only speculate . . .")). Such is not the situation here. Here the transcript clearly reflects that the Court was "satisfied" and "comfortable" with the grounds for its decision. *See* 6/15/07 Transcript, 128:10-22.

Second, the issues Defendants seek to have certified do not go to the merits of the State's lawsuit; they are wholly tangential to the central issue in this case: Defendants' liability for the pollution of the Illinois River Watershed.

Third, certification of these issues would result in an unnecessary expenditure of the State's time, energy and resources. As noted previously, the parties expended significant efforts in briefing and arguing these issues. As explained by Attorney General Edmondson at oral argument:

> Your Honor, the only reason we would oppose that suggestion is because it increases our briefing requirements and it would require an allocation of time to present that issue to the Supreme Court. And we would be resistant to doing that because we don't believe it is a significant question. We don't believe there is any authority that says the attorney general cannot enter into this kind of a contract. We did it in tobacco. We submitted, with our response brief, a slew of other contingency fee contracts that have been entered into by other agencies of state government and our office over the years, none of which have been challenged. And we've also presented now case law of where contingency fee contracts by attorneys general were challenged and those challenges were denied. So we don't think that there is a genuine bona fide dispute as to the law.

6/15/07 Transcript, 118:13-119:2. The State is preparing for trial. Requiring the State to expend time and resources for another round of briefing and for argument before the Oklahoma Supreme Court on this wholly tangential issue would unnecessarily and unfairly prejudice the State. *See, e.g., United States v. Ruiz-Lopez*, 2006 WL 1302194, *2 (D. Kan. May 9, 2006) ("The Court finds that certification at this time would be wasteful of the parties' and the Court's time, energy,

and resources that have already been spent briefing, researching, and determining the issues involved in the motion to suppress").

And fourth, even assuming *arguendo* that it were otherwise appropriate, certification to the Oklahoma Supreme Court is premature. As cogently explained in *Bank of America v. Muselman*, 222 F.Supp.2d 792, 796 (E.D. Va. 2002):

> Certification is an exceptional procedure that should be invoked only rarely at the district court stage. Instead, certification of an issue, if appropriate at all, is preferable at the appellate stage, as the development of a more complete record in the district court will serve to place the candidate issue in sharper focus, and thus aid the court of appeals in weighing whether certification is warranted, and if so, aid in framing the issue to be certified. Also, certification by district courts is typically premature as the litigation process, including discovery, may result in changing the issue, or eliminating it altogether. And, of course, as often occurs, the matter might also be settled by the parties.

In fact, in a not dissimilar situation, the Rhode Island Supreme Court refused to review an interlocutory constitutional challenge to a contingency contract between Rhode Island and private counsel in the lead paint litigation on grounds of prematurity. The Rhode Island Supreme Court explained that ". . . we have concluded that we should postpone our review because their immediate review is not unavoidable at this time. . . . We think that our review of these important constitutional issues will benefit significantly from the expanded record resulting from resolution of these matters in the Superior Court." *State v. Lead Industries Association, Inc.*, 898 A.2d 1234, 1239 (R.I. 2006).

B. Certification of the federal due process issue to the Tenth Circuit is inappropriate

"Interlocutory appeals have long been disfavored in the law, and properly so. They disrupt and delay the proceedings below." *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006). "Only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Federal Trade*

Commission v. Skybiz.com, Inc., 2001 WL 1673630, *1 (N.D. Okla. Oct. 22, 2001) (denying motion for 28 U.S.C. § 1292(b) certification). Certification of an order for interlocutory appeal requires (1) that the issue "involve[] a controlling question of law," (2) that the question of law be one "as to which there is substantial ground for difference of opinion," and (3) that immediate appeal "may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b). Defendants can satisfy none of these requirements, and therefore certification is inappropriate.

As noted above, the propriety of the contingency fee contractual arrangement is a tangential issue that does not go to the merits of the State's claims against Defendants for their pollution of the Illinois River Watershed. Second, there is not substantial ground for difference of opinion on the propriety of contingency fee contractual arrangement.[2] In fact, as indicated by the transcript, the Court here felt "satisfied" and "comfortable" in the soundness of the legal underpinnings of its decision. *See* 6/15/07 Transcript, 128:10-22. And, given the tangential nature of the issue, it cannot be seriously argued that certification for interlocutory appeal would materially advance the ultimate termination of the litigation on the merits. Finally, in light of these factors, certification for interlocutory appeal would place an additional (and unnecessary) briefing burden on the State, resulting in a prejudicial diversion of resources from case preparation.

---

[2] It is difficult to credit the claim that there is a substantial ground for difference of opinion on the propriety of contingency fee contracts with the State when the Tyson Defendants' own counsel has engaged in such contracts. *See* Footnote 5 of "State of Oklahoma's Response to 'Motion of Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., Willow Brook Foods, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., and Peterson Farms, Inc. for Judgment as a Matter of Law in Light of Plaintiff's Constitutional Violations'" [DKT #1085].

Additionally, it should not be overlooked that certification for interlocutory appeal was not raised at the June 15, 2007 hearing; only certification to the Oklahoma Supreme Court was raised. *See* 6/15/07 Transcript, 93:11-2 (". . . what of certifying a question to the Oklahoma Supreme Court . . ."); 118:9-11 ("Now what of the question that I asked Mr. Jorgensen of the possibility of certifying a question to the Oklahoma Supreme Court . . .); 128:12-4 (". . . the attorneys that you've hired as contingency fee counsel might wish to brief this matter for the Oklahoma Supreme Court"). To seek such certification to the Tenth Circuit nearly a month after the ruling is inappropriate.

III. Conclusion

WHEREFORE, for the reasons set forth above, "Defendants' Motion to Certify Questions of Law" [DKT #1217] should be denied in its entirety.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ M. David Riggs
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

David P. Page, OBA #6852
Bell Legal Group
222 S. Kenosha
Tulsa, OK 74120
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice)*
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
Motley Rice, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

Frederick C Baker fbaker@motleyrice.com, mcarr@motleyrice.com; fhmorgan@motleyrice.com

Michael R. Bond michael.bond@kutakrock.com, amy.smith@kutakrock.com

Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com

Paula M Buchwald pbuchwald@ryanwhaley.com

Louis Werner Bullock LBULLOCK@MKBLAW.NET, NHODGE@MKBLAW.NET; BDEJONG@MKBLAW.NET

Gary S Chilton gchilton@hcdattorneys.com

Robin S Conrad rconrad@uschamber.com

W A Drew Edmondson fc_docket@oag.state.ok.us, drew_edmondson@oag.state.ok.us; suzy_thrash@oag.state.ok.us.

Delmar R Ehrich dehrich@faegre.com, etriplett@faegre.com; ; qsperrazza@faegre.com

John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com

Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com

Bruce Wayne Freeman bfreeman@cwlaw.com, lclark@cwlaw.com

D. Richard Funk rfunk@cwlaw.com

Richard T Garren rgarren@riggsabney.com, dellis@riggsabney.com

Dorothy Sharon Gentry sgentry@riggsabney.com, jzielinski@riggsabney.com

Robert W George robert.george@kutakrock.com, sue.arens@kutakrock.com; amy.smith@kutakrock.com

James Martin Graves jgraves@bassettlawfirm.com

Tgrever@lathropgage.com

Jennifer Stockton Griffin jgriffin@lathropgage.com

John Trevor Hammons thammons@oag.state.ok.us, Trevor_Hammons@oag.state.ok.us; Jean!_Burnett@oag.state.ok.us

Lee M Heath ! lheath@motleyrice.com

Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com

Philip D Hixon phixon@mcdaniel-lawfirm.com

Mark D Hopson mhopson@sidley.com, joraker@sidley.com

Kelly S Hunter Burch fc.docket@oag.state.ok.us, kelly_burch@oag.state.ok.us; jean_burnett@oag.state.ok.us

Tina Lynn Izadi; tina_izadi@oag.state.ok.us

Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com; loelke@ryanwhaley.com

Bruce Jones bjones@faegre.com, dybarra@faegre.com; jintermill@faegre.com; cdolan@faegre.com

Jay Thomas Jorgensen jjorgensen@sidley.com

Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com

Krisann C. Kleibacker Lee; kklee@faegre.com

Nicole Marie Longwell Nlongwell@@mcdaniel-lawfirm.com

Archer Scott McDaniel smcdaniel@mcdaniel-lawfirm.com

Thomas James McGeady tjmcgeady@loganlowry.com

James Randall Miller rmiller@mkblaw.net, smilata@mkblaw.net; clagrone@mkblaw.net

Charles Livingston Moulton Charles.Moulton@arkansasag.gov, Kendra.Jones@arkansasag.gov

Indrid Moll; imoll@motleyrice.com

Robert Allen Nance rnance@riggsabney.com, jzielinski@riggsabney.com

William H Narwold bnarwold@motleyrice.com

Jonathan Orent ; jorent@motleyrice.com

George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com

David Phillip Page dpage@edbelllaw.com, smilata@edbelllaw.com

Robert Paul Redemann rredemann@pmrlaw.net, scouch@pmrlaw.net

Melvin David Riggs driggs@riggsabney.com, pmurta@riggsabney.com

Randall Eugene Rose ! rer@owenslawfirmpc.com, ka@owenslawfirmpc.com

Michael Rousseau ; mrousseau@motleyrice.com

Robert E Sanders rsanders@youngwilliams.com,

David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net; ntorres@pmrlaw.net

Paul E Thompson , Jr pthompson@bassettlawfirm.com

Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com

John H Tucker jtuckercourts@rhodesokla.com, lwhite@rhodesokla.com

Elizabeth C Ward lward@motleyrice.com

Sharon K Weaver sweaver@riggsabney.com, lpearson@riggsabney.com

Timothy K Webster twebster@sidley.com, jwedeking@sidley.com

Gary V Weeks !

Terry Wayen West terry@thewestlawfirm.com,

Edwin Stephen Williams steve.williams@youngwilliams.com

Douglas Allen Wilson Doug_Wilson@riggsabney.com, pmurta@riggsabney.com

P Joshua Wisley ; jwisley@cwlaw.com, jknight@cwlaw.com

Elizabeth Claire Xidis cxidis@motleyrice.com

Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net

Also on this 8th day of August, 2007 I mailed a copy of the above and foregoing pleading to:

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/ M. David Riggs
M. David Riggs